U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date Issued: June 2, 1998
Case No.: 96-INA-482

In the Matter of:

THE SAMARITANS OF NEW YORK, INC.,
Employer,

on behalf of

KATHARINE LUCY MCGREDIE,
Alien.

Appearance: James A. O'Malley, Esquire

Before: Burke, Guill and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam: This case arises from an application for labor certification[1] filed by The Samaritans of New York, Inc., Employer, for the position of Associate Director, Suicide Prevention and Public Education (AF 5).[2]

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. §656.27(c).

STATEMENT OF THE CASE

Employer filed an application on March 2, 1995, seeking labor certification for Katharine Lucy McGredie, Alien. The duties of the job were described as follows:

> Supervise and implement multi-cultural suicide prevention training program for 24-hour hotline, including recruitment of 100+ volunteers, oversee and administer public education and community

[1]Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. Unless otherwise indicated, all regulations cited to herein may be found at Title 20 of the Code of Federal Regulations.

[2]"AF" is an abbreviation for "Appeal File."

outreach program in Tri-state area; provide liaison to international organization, including media relations and volunteer conferences.

Employer required that applicants have twelve years of education, computer and "WP skills", experience supervising a volunteer staff and two years of experience in the job offered or two years of experience in the related occupation of Assistant Director, Communications and Development in a non-profit volunteer agency (AF 5). The job offer specified a 40 hour work-week at a wage of $22,000.00 per year.

The CO issued a Notice of Findings (NOF) proposing to deny certification on February 26, 1996 (AF 20-23). The CO stated that the annual wage offer of $22,000.00 is below the prevailing wage of $35,000.00 per year, as determined by Langer, Compensation in Non-Profit Organizations, 7th Edition, page 817, mean wage, New York City. *See* §§ 656.20(c)(2) and 656.40. The CO stated further that Employer may rebut these findings by increasing the salary offer to equal or exceed the prevailing wage, or by submitting countervailing evidence that the prevailing wage determination is incorrect and that Employer's wage offer equals or exceeds the prevailing wage.

The CO further stated that the Alien did not appear to have experience in the job offered or two years of experience as an Assistant Director, Communications and Development prior to hire; that Employer trained the Alien for this job and must fully document why it is not feasible to train a U.S. worker at this time; or Employer may submit evidence which clearly shows that the Alien, at the time of hire, had the qualifications which Employer is now requiring; or Employer may reduce the requirements to that which the Alien had at the time of hire. *See* §656.21(b)(5). The CO also requested that Employer explain what "WP skills" means in item 15 of the ETA form 750A (AF 24).

Employer, by counsel submitted rebuttal on April 2, 1996 (AF 24-30). Employer stated that its rebuttal includes an amended form ETA 750A and B which changes the weekly work hours to 26.5 (item 10 a) and the annual compensation to $26,500.00 (item 12 a). Employer stated that since the position is now three-quarters of a full-time job, the amended salary complies with the CO's determination that a full-time position requires $35,000.00 per year. Employer stated that the offered position differs from the position of Assistant Director, Communications and Development and described the job duties.

The CO issued a supplemental NOF on April 8, 1996 (AF 31-35). The CO stated that there appears to be no difference in the duties of the Alien's current position of Assistant Director, Communications and Development and the offered job, other than "overall" responsibility; that they both deal with fund raising, training and education, suicide prevention programs and supervision. The CO stated that Employer has not established that the positions are sufficiently dissimilar. The CO also stated that the offered job is a newly created position and that the Alien in her current position works with the Executive Director; that other than a name change, the Executive Director was the Associate Director for Suicide Prevention and Public Education. Therefore, it appears that the offered job is in a normal career progression line.

The CO also stated that since the Alien has worked for 18 hours per week in her current position as Assistant Director, it does not appear that she has two full years of experience in the related occupation; rather she has two and one-half years of part-time experience.

The CO again directed Employer to fully document why it is not now feasible to train a U.S. worker, as it trained the Alien; or submit evidence which clearly shows that the Alien, at the time of hire, had the necessary qualifications which Employer is now requiring; or reduce the requirements to those possessed by the Alien at the time of hire. Employer was directed to provide specific information if it chose to document why it is not feasible to train a U.S. worker.

The CO also stated that Employer's amendment reducing the working hours to 26.5 hours per week and the pay to three-quarters of the prevailing full-time wage raises the issue of whether a permanent full-time job opportunity exists. Employer was instructed to document that it is normal and customary for Associate Directors, supervising two employees, to work 26.5 hours per week; provide evidence such as tax forms and/or social security reports for the last three years; and provide independent evidence that it is normal and customary for similar non-profit employers to have Associate Directors working 26.5 hours per week. Employer was also instructed to explain the change in the weekly working hours from 40 to 26.5. The CO again stated that Employer's wage offer of $26,500.00 per year is below the prevailing wage of $35,000.00 per year for the offered job and instructed Employer to respond.

Employer, by counsel, responded with rebuttal on May 15, 1996 (AF 36-57). Employer stated that the Alien's old job was 60 percent fund raising, whereas the new job is less than 5 percent; that the old job was 40 percent assisting in the running of programs, whereas the new job is 50 percent running programs; that in a three-to-five person organization like ours, every job involves training, education and suicide prevention work to some extent. Employer stated further that the Executive Director has always focused on fund raising, community relations, providing technical assistance, acting as a mental health consultant and giving support to government and other agencies; that the new Associate Director's job does not handle these areas. Employer stated that over the last six years, Executive Directors have been sought from outside the organization, not from within. Employer recognized that the Alien does not have the required experience in the related occupation of Assistant Director, Communication and Development and therefore, amended the experience requirement in the related occupation to one year (ETA 750, item 14).

Employer stated further that from 1992 until 1994, it had an Associate Director, Fiodhna O'Grady, who worked half-time, three-quarters time and full-time, (35 hours per week); that many CEO's of corporations work more than 40 hours per week for their pay; that a ratio of full-time to part-time work applies to organizations with budgets of less than one million dollars. In support of its contention, Employer attached the 1995 Survey of New York Metropolitan Area Not-for-Profit Organizations Compensation and Benefits; Ernst and Young, and W-2 tax forms for two employees.

The CO issued a Final Determination denying certification on May 21, 1996 (AF 58-60).

The CO stated that Employer had failed to present convincing evidence that 26.5 hours per week is customary for the advertised job; that the employment history of Fiodhna O'Grady does not establish that 26.5 hours per week is full-time employment. The CO further stated that Employer's argument that the change in working hours from 40 to 26.5 hours per week reflects the hours compensated and not the hours on the job is disingenuous and suggests that the Director of Suicide Prevention and Public Education will be working full-time for part-time pay. The CO also stated that the wage survey by Ernst and Young supported the prevailing wage determination of $35,000.00 per year and that Employer's contention about a 2.5 to 1 ratio of full to part-time employees does not appear to have any relevance to either the full-time nature of the job or issues related to prevailing wage. The CO concluded that Employer had failed to demonstrate that the offered job is full-time or that the prevailing wage determination is in error.

Employer, by counsel, requested administrative-judicial review on June 24, 1996 (AF 61-70). Employer contends that the CO failed to take into account the unique volunteer nature of Employer's organization in determining the prevailing wage and working conditions of the position being offered and that Employer established through a good faith showing that it complied with the prevailing standards within its unique industry as to salary and working conditions.

DISCUSSION

The issue is whether the job offer is for full-time employment at the prevailing wage.

The regulations at 20 CFR 656.3 define "employment" as permanent full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that it has the *ability* to offer permanent and full-time work. ***Gerata Systems America, Inc.***, 88-INA-344 (Dec. 16, 1988) (*en banc*). Moreover, an employer is required to offer a wage that equals or exceeds the prevailing wage for the position being offered to the alien. §656.40; ***Lis Milan***, 93-INA-170 (Jan. 24, 1995).

The policy underlying permanent labor certification is that an employer may recruit aliens to fill a *bona fide* job opportunity for which U.S. workers are not able, willing, qualified and available, in return for a full-time salary that will not depress the wages and working conditions of U.S. workers similarly employed. ***Gerata Systems***, *supra* (Guill, A.C.J., *dissenting*). Employer was notified by the CO in the NOF that its wage offer of $22,000.00 per year was below the full-time prevailing wage of $35,000.00. Employer responded by amending the work hours to 26.5 and the wage offer to $26,500.00, and arguing that as a result of the amendments the offered position is now three-quarters of a full-time job with a salary that is consistent with the CO's finding of $35,000.00 per year for a full-time position (AF 29).

The fundamental problem with this application is that by reducing the work hours to 26.5 and offering a salary less than full-time wages, Employer did not establish that it has the ability to offer permanent full-time employment. In this regard, we find that Employer's rebuttal is insufficient to establish that it is normal or customary in the industry to work a shortened

workweek.

Further, we note that Employer's argument that the CO's findings as to the prevailing wage do not take into account the unique volunteer nature of Employer's organization fails in light of ***Hathaway Children's Services***, 91-INA-388 (Feb. 4, 1994) (*en banc*) *overruling* ***Tuskegee University***, 87-INA-561 (Feb. 23, 1998) (*en banc*) (holding that the requirement that a prevailing wage determination take into consideration wages of those workers "similarly employed" does not refer to the nature of the Employer's business as such).[3] In support of its position, Employer offered evidence of an employee who worked less than 40 hours per week in 1992 and 1993 in jobs other than the newly created job being offered to the Alien and Employer argued that a ratio exists of full to part-time employees for non-profit organizations with budgets of less than one million dollars per year and that CEO's of major companies often work additional hours beyond those for which they are paid (AF 56). This evidence and argument are inadequate to carry Employer's burden of proof on the issues. A single employee's work history for two years or the ratios of full to part-time employees do not establish that it is normal and customary in the occupation for an Associate Director of a non-profit company to work 26.5 hours per week. Accordingly, Employer has not demonstrated that its job offer is for full-time employment or that its wage offer equals or exceeds the prevailing wage for the job. The Ernst and Young wage survey offered by Employer in rebuttal supports the CO's wage determination, rather than Employer's contentions. For the above reasons, we find that certification was properly denied. Accordingly, the following Order shall enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

3 In making this citation we note that the Employment and Training Administration has recently published amendments to the regulations governing permanent alien labor certification which specifically overrule ***Hathaway***, *supra*, but only to the extent that the application is for researchers employed at colleges and universities, college and university operated federally funded research and development centers, and certain federal agencies. *See* 63 FED. REG. 13755-13767 (1998).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.